

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERESO ROAN)	
Claimant)	
VS.)	
)	
WESCON PRODUCTS)	Docket No. 198,065
Respondent)	
Self-Insured)	

ORDER

Respondent requests review of the Award dated October 27, 1997, entered by Assistant Director Brad E. Avery.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for the claimant. Gregory D. Ballew of Wichita, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Assistant Director awarded claimant permanent partial general disability benefits for a 56.65 percent work disability. Respondent requests the Appeals Board to review the following issues:

- (1) Did claimant sustain personal injury by accident which arose out of and in the course of employment with respondent on November 28, 1994?

- (2) What is the nature and extent of claimant's injury and disability?
- (3) Is claimant entitled to unauthorized and future medical benefits?

Respondent contends claimant is disingenuous and that any back injury which claimant may now have is not the result of an accident that occurred while claimant was working for the respondent. Respondent, instead, contends the back injury is attributable to a 1991 injury which occurred while claimant was employed by someone else. In the alternative, respondent contends claimant should receive permanent partial general disability benefits for his functional impairment rating only. In its brief to the Appeals Board, respondent did not address its objection to claimant's entitlement to unauthorized and future benefits. Thus, other than respondent's contention that claimant did not injure himself while working for the respondent, the Appeals Board is not aware if respondent has specific objections to the Assistant Director's finding that claimant (1) may be entitled to future medical care upon proper application to the Director and (2) is entitled to unauthorized medical expense upon proof the expense has been incurred.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

- (1) Claimant is 39 years old and has a second or third grade education from his native country, Mexico. His only vocational training has been on the job.
- (2) Claimant alleges he injured his back while working for the respondent on November 28, 1994, when he lifted and moved a heavy pallet. At the time of the incident, claimant felt a popping sensation and pain in his back. Claimant immediately notified respondent of the incident and two or three days later sought medical treatment from his personal physician who advised him to obtain treatment from the company doctor.
- (3) The parties stipulated claimant's average weekly wage on November 28, 1994, was \$376.71.
- (4) When claimant testified at both the regular hearing held in April 1996 and later at his deposition in December 1996, he had not worked since leaving respondent's employment shortly after the accident. Before the regular hearing, claimant had not sought work from any employers. By December 1996, claimant had sought work from four different employers.

(5) In 1991 claimant strained his low back while working for a different employer. At the time of that accident, claimant sought medical treatment from a minor emergency center. Claimant recovered from the 1991 injury.

(6) Board-certified neurosurgeon Leonard A. Klafta, M.D., saw claimant on January 4, 1995, on a referral from respondent's company doctor. Dr. Klafta performed a myelogram and had claimant undergo a CT scan that confirmed narrowing or stenosis at both the L3-4 and L4-5 intervertebral levels and a possible herniated disc at the L5-S1 level. He recommended claimant consider surgery at the L4-5 and L5-S1 levels that claimant declined. Although claimant's symptoms expanded during the period Dr. Klafta saw claimant to include radiating pain in the mid and upper back and both arms and hands, the doctor generally believed claimant's complaints and symptoms were genuine but not necessarily related to the accident at work. In addition, Dr. Klafta indicated in his letter dated December 22, 1995, to respondent's counsel that claimant's problems after the November 1994 accident were different from those after the 1991 injury considering the different complaints he had after each incident. The doctor estimates claimant's whole body functional impairment to be in the range of 7 to 8 percent based upon the revised third edition of the AMA Guides.

(7) On a referral from Dr. Klafta, board-certified neurosurgeon William M. Shapiro, M.D., saw claimant on two occasions in July 1995. Due to claimant's unusual pain complaints, the doctor was unable to form a diagnosis or determine a cause for the complaints of tenderness at the twelfth thoracic and seventh cervical vertebrae.

(8) At the request of claimant's attorney, Lawrence R. Blaty, M.D., who is board-certified in physical medicine and rehabilitation, evaluated claimant in November 1995. After examining claimant and reviewing the results from Dr. Klafta's myelogram and CT scan, Dr. Blaty diagnosed chronic upper and low-back syndrome and lumbar spinal stenosis with disc herniation and radiculopathy. The doctor believed claimant should observe certain medical restrictions:

This patient is functionally limited as the result of his back condition. At this point he is likely at his maximum medical improvement with the treatment that is offered, and I would recommend that he restrict his activities, including avoiding any level lifting, pushing, pulling or carrying greater than 40 pounds occasionally or 20 pounds frequently. He should avoid any overhead lifting greater than 30 pounds occasionally or 15 pounds frequently. He should also be limited to occasional overhead reaching and occasional bending or twisting activities with his lower back. He should avoid any prolonged or repetitive flexion or extension activities with his neck.

(9) Vocational rehabilitation consultant Karen Crist Terrill prepared a task list that identified 32 different job tasks that claimant had performed over the 15-year period immediately before the November 1994 accident. Another vocational rehabilitation counselor, James T. Molski, prepared a task list that identified 28 former tasks.

(10) Dr. Blaty believes claimant now has a 12 percent whole body functional impairment which consists of 8 percent for the low back and 4 percent for the neck and upper back. After reviewing the job task analysis prepared by Ms. Terrill, the doctor indicated claimant could no longer perform 27 of his 32 former job tasks, or 84.4 percent. When reviewing the job task list containing 28 former tasks prepared by Mr. Molski, the doctor indicated claimant could only perform 50 percent of those tasks.

(11) Pedro A. Murati, M.D., who is also board certified in physical medicine and rehabilitation, testified on two occasions. He examined claimant in March 1996 at the request of respondent's attorney. During that evaluation, claimant described complaints of pain in both legs that started after being in physical therapy and pain in both arms and hands that started approximately eight months after the accident. Other complaints included pain in the neck, both knees, feet, groin, and chest. Although many of the complaints did not have a physical basis, the doctor thought claimant might have a serious low-back condition due to the spinal stenosis.

(12) Also considering Dr. Blaty's work restrictions and after reviewing Mr. Molski's task list, Dr. Murati testified claimant could probably perform 13 of the 28 tasks, which equates to a 54 percent task loss.

(13) In June 1996, board-certified neurosurgeon Paul S. Stein, M.D., evaluated claimant at his attorney's request. Dr. Stein found claimant had a congenitally narrow spinal canal and slight bulging of the discs between the L3-4 and L4-5 intervertebral levels. The doctor testified he did not disagree with either the restrictions or 12 percent whole body functional impairment rating that Dr. Blaty had provided.

(14) The Appeals Board adopts the Assistant Director's findings as set forth in the Award to the extent they are not inconsistent with the above.

CONCLUSIONS OF LAW

(1) The Appeals Board finds claimant injured his back while working for the respondent on November 28, 1994, and that the accident arose out of and in the course of his

employment with the respondent. A back strain which claimant sustained while working for another employer in 1991 had resolved before the November 1994 accident.

(2) Because his is an “unscheduled” injury, claimant’s entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Claimant was unemployed when he testified in April and December 1996 and, therefore, had a 100 percent difference in pre- and post-injury average weekly wage. But when a worker has not made a good faith effort to seek appropriate employment, a post-injury wage should be imputed based upon post-accident wage earning ability. See Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

The Assistant Director found claimant had the ability to earn \$5.25 per hour. But when the Assistant Director multiplied that hourly rate by 40, he erred in his math and found a \$215 weekly wage instead of \$210. Based upon Mr. Molski’s opinion, the Appeals Board also finds claimant retains the ability to earn \$5.25 per hour or \$210 per week. Comparing the \$210 to the stipulated average weekly wage of \$376.71 yields a 44 percent difference between pre- and post-injury wage.

Based upon Dr. Blaty’s testimony, the Appeals Board finds claimant has lost the ability due to his work-related accident to perform between 50 and 84 percent of his former job tasks. After considering that range of loss, the Appeals Board finds a task loss percentage of 69.3 as did the Assistant Director.

As required by K.S.A. 44-510e, the Appeals Board averages the 44 percent wage loss with the 69.3 percent task loss and finds that claimant has a 56.65 percent permanent partial general disability for which he should receive benefits.

(3) Should the need arise, claimant may request additional medical care and treatment. As provided by K.S.A. 44-510, an employer is required to provide medical treatment as may be reasonably necessary to cure and relieve the injured worker from the effects of the industrial accident, including those which may develop in the future as a natural consequence of the accident. Therefore, claimant's opportunity to request future medical benefits should remain intact.

The Appeals Board also finds claimant is entitled to unauthorized medical up to the statutory maximum of \$500 upon presentation of proof of the expense.

(4) The Award should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated October 27, 1997, entered by Assistant Director Brad E. Avery, dated October 27, 1997, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Gregory D. Ballew, Wichita, KS
Brad E. Avery, Assistant Director
Philip S. Harness, Director